

---

---

IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

PACIFIC NATURAL GAS Co.,  
a corporation,

*Petitioner,*

*vs.*

FEDERAL POWER COMMISSION,

*Respondent.*

✓  
No. 16498

---

OPENING BRIEF OF PETITIONER

---

Upon Review of Order of Federal Power Commission

---

PRESTON, THORGRIMSON & HOROWITZ  
Office and Post Office Address:  
Northern Life Tower  
Seattle, Washington

METZGER, BLAIR & GARDNER

A. E. BLAIR

Office and Post Office Address:  
521 Tacoma Building  
Tacoma 2, Washington

*Attorneys for Petitioner.*





---

---

IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

PACIFIC NATURAL GAS Co.,  
a corporation,

*Petitioner,*

*vs.*

FEDERAL POWER COMMISSION,

*Respondent.*

No. 16498

---

OPENING BRIEF OF PETITIONER

---

Upon Review of Order of Federal Power Commission

---

PRESTON, THORGRIMSON & HOROWITZ  
Office and Post Office Address:  
Northern Life Tower  
Seattle, Washington

METZGER, BLAIR & GARDNER  
A. E. BLAIR

Office and Post Office Address:  
521 Tacoma Building  
Tacoma 2, Washington

*Attorneys for Petitioner.*





## INDEX

## SUBJECT INDEX

	PAGE
Statement as to Jurisdiction.....	1
Statement of the Case.....	2
Specification of Errors.....	8
Argument .....	8
Conclusion .....	20

## TABLE OF CASES

<i>Chicago, Milwaukee &amp; St. Paul Ry. Co. v. State of Minnesota</i> , 134 U.S. 418, 33 L.Ed. 970.....	17
<i>Detroit Trust Co. v. Stormfeltz-Loveley Co.</i> , 242 N.W. 227 .....	17
<i>Gilman v. Tucker</i> , 128 N.Y. 190, 28 N.E. 1040, 13 L.R.A. 304.....	17
<i>Montana-Dakota Utilities Co. v. Northwestern Public Services Co.</i> , 341 U.S. 246, 95 L.Ed. 912.....	16
<i>Natural Gas Pipeline Co. v. Federal Power Commission</i> , 253 F.(2d) 3.....	19
<i>Taller &amp; Cooper v. Illuminating Electric Co.</i> , 172 F.(2d) 625 .....	11
<i>T.I.M.E., Inc. v. United States of America</i> , 3 L.Ed. (2d) 952 .....	16

## TABLE OF CASES—Continued

	PAGE
<i>Truax v. Corrigan</i> , 257 U.S. 312, 66 L.Ed. 254.....	17
<i>United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division</i> , 358 U.S. 105, 3 L.Ed. 153....	15, 19
<i>United Gas Pipe Line Co. v. Mobile Gas Service Corp.</i> , 350 U.S. 332, 100 L.Ed. 373.....	11
<i>Washington Chocolate Co. v. Canterbury Candy Makers, Inc.</i> , 18 Wn.(2d) 79, 138 P.(2d) 195.....	11

## STATUTES

15 USCA §717, <i>et seq.</i> .....	2, 21-24
15 USCA §717(b) .....	2
15 USCA §717a(6) .....	2
15 USCA §717r(b) .....	1

## TEXTS

12 Am. Jur. 279, §582.....	17
12 Am. Jur. 373, §698.....	17
16A C.J.S. 767, §614.....	17
77 C.J.S. 623, §21b.....	11

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC NATURAL GAS CO.,  
a corporation,

*Petitioner,*

*vs.*

FEDERAL POWER COMMISSION,

*Respondent.*

No. 16498

---

## OPENING BRIEF OF PETITIONER

---

Upon Review of Order of Federal Power Commission

---

## JURISDICTION

This is a proceeding to review an order of the Federal Power Commission. This court has jurisdiction under the provisions of Section 19(b) of the Natural Gas Act, 15 USCA §717r(b), 52 Stat. 831. The order under review was issued by the Federal Power Commission February 25, 1959 (R. 1372-4). Petitioner herein filed a motion for reconsideration, constituting a motion for rehearing, on March 18, 1959 (R. 1375-7). On June 12, 1959 Petitioner filed its petition for review in this court.

## STATEMENT OF THE CASE

### Identification of Parties

Pacific Natural Gas Company, Petitioner herein, is a public utility company engaged in the business of purchasing, distributing and selling natural gas in the State of Washington. The natural gas so purchased has been and is being purchased from Pacific Northwest Pipeline Corporation, an intervenor herein, it having the only available source of supply. Pacific Northwest Pipeline Corporation, hereinafter referred to for convenience as "Pipeline Corporation," is a "natural-gas company" as that term is defined in the Natural Gas Act, 15 USCA §717a(6), 52 Stat. 821. The sales by Pipeline Corporation to Petitioner are "jurisdictional" sales, in the sense that they are sales to which the provisions of the Natural Gas Act are made applicable by Section 1(b) thereof, 15 USCA §717(b), 52 Stat. 821. The Commission charged with the administration of the Act is the Federal Power Commission.

The pertinent provisions of the Natural Gas Act, 15 USCA §717, *et seq.*, referred to as the "Act," are set out in Appendix A, *infra*.

### Questions Involved

There are two methods by which rate changes may be accomplished under the Act, the first under the provisions of Section 4(d) and (e), and the other under Section 5(a).



Section 4(d) provides that no change shall be made in an existing rate except after 30 days' notice to the Commission, to be given by filing new schedules showing the changes.

Section 4(e) authorizes the Commission upon complaint or its own initiative, upon reasonable notice, to enter upon hearing concerning the lawfulness of such noticed rate; to suspend the rate for a period no longer than five months beyond the time when it would otherwise go into effect:

“ . . . *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; . . . ”

and, if the proceeding has not been concluded and an order made at the expiration of the suspension period, to require a bond or undertaking from the natural-gas company conditioned to refund with interest any portion of the increased rates ultimately found not justified, as a condition to their becoming effective.

Section 5(a) provides that whenever the Commission after hearing had upon its own motion or upon complaint shall find that any rate is unreasonable, unjust or unduly discriminatory, the Commission shall determine the just and reasonable rate to be thereafter observed, and shall fix the same by order.

The questions involved in this review stem from the *proviso* in Section 4(e) which denies to the Commission authority to suspend rate increases for the sale

of natural gas for resale for industrial use only. For convenience such gas will be herein referred to as “industrial gas.”

The first question is whether a contract between a natural-gas company and its distributor customer which provides that the natural-gas company may file rate changes under Section 4 of the Natural Gas Act, and also expressly provides that such customer shall have the right to protest any such rate changes before the Federal Power Commission, gives consent to the unilateral filing under Section 4(d) of increased rates for natural gas sold for resale for industrial use only. It is our contention that under such a contract the natural-gas company bargained away its right to file unilateral rate increases for industrial gas under Section 4(d), because the provisions of Section 4(e) deny to the distributor any right to make effective protest of the rate increase before the Federal Power Commission.

The second question presented is whether Section 4(d) and (e) of the Natural Gas Act when applied to a unilateral filing thereunder by a natural-gas company of increased rates for natural gas sold for resale for industrial use only meets the due process requirements of the Fifth Amendment to the Constitution of the United States.

It is our contention that because Section 4(e) makes no provision for suspension, interim refund or award of reparation of any rate increase so filed which is ultimately held to be unjust, unreasonable or discriminatory,

and therefore unlawful, this statutory deficiency permits Petitioner to be deprived of its property without due process of law and without just compensation, contrary to the Fifth Amendment. It is our further contention that not only does the Act foreclose any right of suspension, interim refund or award of reparations by the Commission, but it also deprives Petitioner of its right by court action to recover amounts paid under rates ultimately held by the Commission to be unlawful.

### **Petitioner's Contract with Pipeline Corporation**

Petitioner entered into an agreement with Pipeline Corporation dated May 3, 1957 and designated by Pipeline Corporation as its PNW Contract No. 65, which contract covered the sale by Pipeline Corporation to Petitioner and the purchase by Petitioner from Pipeline Corporation of industrial interruptible gas only (R. 1067-71). The contract provided that Petitioner should pay to Pipeline Corporation for natural gas service rendered under the agreement in accordance with Pipeline Corporation's Rate Schedule I-1 as filed with the Federal Power Commission and as such rate schedule may be amended or superseded from time to time. That rate schedule, a copy of which was attached to the contract, provided for a rate of 2.5c per therm. Article III of the contract providing for this rate schedule reads as follows:

### “ARTICLE III—APPLICABLE RATE SCHEDULE

“Buyer agrees to pay Seller for all natural gas service rendered under the terms of this Agreement in accordance with Seller’s Rate Schedule I-1 as filed with the Federal Power Commission, and as such rate schedule may be amended or superseded from time to time. This Agreement shall be subject to the provisions of such rate schedule and the General Terms and Conditions applicable thereto on file with the Federal Power Commission and effective from time to time, which by this reference are incorporated herein and made a part hereof.”

Paragraph 10 of the General Terms and Conditions referred to in the above quoted paragraph provides as follows:

#### “10. STATUTORY REGULATION

“Seller’s rates, charges, classifications and services as set forth in this Tariff are subject to regulation by the Federal Power Commission under the Natural Gas Act. Seller shall have the right to file from time to time with the Federal Power Commission under Section 4 of the Natural Gas Act such new rate schedules and changes in its existing effective Tariff as Seller may find necessary from time to time to assure Seller just and reasonable rates and charges as well as a rate of return sufficient to service the Seller’s debt, attract capital, insure expansion and provide adequate natural gas service to all Seller’s customers. Without in any way limiting the generality of the foregoing, Seller shall have the right to file new rate schedules fairly and appropriately reflecting changes in the rates and charges paid by Seller for natural gas. Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission.”



## Proceedings Before the Commission

On August 6, 1957 Pipeline Corporation filed with the Commission schedules covering a general increase in its rates (R. 434-687). Included was Second Revised Sheet No. 14, increasing the rate for industrial gas to 2.86c per therm. This filing was docketed by the Commission under Docket No. G-13202, and by order entered September 4, 1957 (R. 817) all of the filings except First Revised Sheet No. 15 and Second Revised Sheet No. 14 were suspended to February 5, 1958, and until such further time as they may be made effective in the manner prescribed by the Natural Gas Act.

By order entered October 31, 1957 (R. 987) Petitioner was granted intervention in Docket No. G-13202, and on January 17, 1958 it moved for an order rejecting the filing of the revised tariff sheets applicable to it, including Second Revised Sheet No. 14 (R. 1061-76).

On February 25, 1959 this motion to reject was summarily denied, without hearing or argument (R. 1372-4). On March 18, 1959 Petitioner filed a motion for reconsideration of the order entered February 25, 1959 denying its motion to reject the filing of rate increases (R. 1375-93). No action was taken by the Commission with respect to this motion until July 23, 1959, when it entered an order denying the motion, again without hearing or argument of any kind (R. 1409-12). In the meantime, and on June 12, 1959, more than 30 days having expired without the Commission having acted upon the motion, Petitioner filed with this court its petition for review.

## SPECIFICATION OF ERRORS

1. The Commission erred in denying Petitioner's motion to reject the filing of Pacific Northwest Pipeline Corporation's Second Revised Sheet No. 14, filed August 6, 1957, to become effective September 5, 1957, increasing rates for industrial gas from 2.5c to 2.86c per therm.

2. The Commission erred in denying Petitioner's motion for reconsideration of the foregoing order.

## ARGUMENT

### I

**By Granting Petitioner the Right to Protest Rate Increases Before the Federal Power Commission, Pipeline Corporation Bargained Away its Right to Unilaterally File Increased Rates for Industrial Gas Under Section 4 of the Act**

For convenience we again set forth Paragraph 10, which was incorporated into the agreement of May 3, 1957 by reference:

### “10. STATUTORY REGULATION

“Seller's rates, charges, classifications and services as set forth in this Tariff are subject to regulation by the Federal Power Commission under the Natural Gas Act. Seller shall have the right to file from time to time with the Federal Power Commission under Section 4 of the Natural Gas Act such new rate schedules and changes in its existing effective Tariff as Seller may find necessary from time to time to assure Seller just and reasonable rates and charges as well as a rate of return sufficient to service the Seller's debt, attract capital,

insure expansion and provide adequate natural gas service to all Seller's customers. Without in any way limiting the generality of the foregoing, Seller shall have the right to file new rate schedules fairly and appropriately reflecting changes in the rates and charges paid by Seller for natural gas. Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission."

It will be noted that the second sentence of this paragraph does not give Pipeline Corporation an express, unqualified right to file new rate schedules and changes under Section 4 of the Natural Gas Act. The right is by language limited to such as seller may find necessary from time to time to assure it of rates sufficient to cover many things, in addition to and not necessarily ingredients of just and reasonable rates. The standard that these may be such as the seller find necessary from time to time creates wholly a subjective standard. Probably the effect, if the second and third sentences stood alone, would not be different legally than if the right had been unqualified. The rates fixed would be at the will of Pipeline Corporation. Nor would they be "going" rates, because Pipeline Corporation could with impunity file discriminatory and nonuniform schedules. Any rate Pipeline Corporation chose to file for industrial gas under Section 4(d) would by the mandatory terms of Section 4(e) become effective in 30 days, without consent or any other action on the part of the Commission, and without any power of suspension, interim refund or reparation, no matter how unjust, unreasonable or discriminatory the filed rates might be.

This brings us to a consideration of the meaning of the last sentence of Paragraph 10, which reserves to Petitioner the right to protest any such new rate schedules and changes before the Federal Power Commission. It must be agreed that this provision was intended to grant a real and substantial right of protest. This must mean a protest which, if the proposed increased rates or charges are unjust and unreasonable, would avoid their effective imposition. As used in a contract of this kind, it must embrace the conception of an opportunity to be heard before the Federal Power Commission in a proceeding adapted to the end sought to be accomplished. Any other conception would nullify the right granted. As to rates for other than industrial gas, we concede that the statutory provisions of Section 4 with respect to suspension and refund as construed and applied by the Commission substantially assure this right. But as to rates for industrial gas, they become effective without any act or consent of the Commission, and the Commission is wholly without power to suspend them or to preserve a right to interim refund if at some indeterminate time in the future they are found to have been unjust, unreasonable or discriminatory, and therefore unlawful.

To make the last sentence of Paragraph 10 meaningful it must be held that the express consent to file under Section 4 given in the second sentence of the paragraph is by necessary implication limited to filings other than those relating to industrial gas, in the absence of consent to the specific rate filed. Schedules amending or superseding Schedule I-1, the rate for industrial



interruptible gas referred to in Article III of the contract, must necessarily mean and be limited to schedules expressly consented to by Petitioner or resulting from proceedings under Section 5(a) of the Act. Only by so construing the whole contract will the integrity of the last sentence of Paragraph 10 be preserved.

This construction of the contract is given support by further consideration of the legal effect of the second and third sentences of Paragraph 10 if they were to apply to rates for industrial gas. As applied to rates for such gas, it must be held that they would make the price conditioned entirely on the will of the Pipeline Corporation. A contract for the future delivery of personalty cannot be enforced if the price of the article to be delivered is conditioned entirely on the will of one of the parties. 77 C.J.S. 623, §21b; *Taller & Cooper v. Illuminating Electric Co.*, 172 F.(2d) 625, 626; *Washington Chocolate Co. v. Canterbury Candy Makers, Inc.*, 18 Wn.(2d) 79, 85, 138 P.(2d) 195. Application of this rule would invalidate the provisions of the contract relating to change of price for industrial gas and leave the named rate fixed in the contract in effect, thus bringing the case within the rule of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 100 L.Ed. 373. In that case the Supreme Court held that the right of the natural-gas company to change its rates for sales made pursuant to contract is defined by the terms of the contract, and, absent contractual consent, Section 4(d) of the Natural Gas Act gave no right to increase the contract rate by a filing thereunder.

## II

**To Permit the Unilateral Filing of Rates for Industrial Gas by Pipeline Corporation Under Section 4(d) of the Natural Gas Act Will Permit the Taking of Petitioner's Property Without Due Process of Law, Contrary to the Fifth Amendment to the Constitution of the United States.**

In its order issued September 4, 1957 in Docket No. G-13202 (R. 817-9) the Commission stated in the first paragraph:

“Pacific Northwest Pipeline Corporation (Pacific), on August 6, 1957, tendered for filing First Revised Sheet Nos. 4, 7, 10, 15, 16-C, and 16-E; Section Revised Sheet Nos. 6, 8, 9, 11, 12, 13, 14, and 20; and Original Sheet No. 20-A to its FPC Gas Tariff, Original Volume No. 1. Said tendered sheets are intended to be made effective on September 5, 1957, and propose an annual increase in rates and charges for jurisdictional sales amounting to approximately \$5,500,000, based on estimated 1957 sales volumes. The proposed increase is 17 per cent over the rates and charges now being collected by Pacific.”

After reference to certain protests made and to certain of the questionable items included in the increased rates, the order then provides:

“The increased rates and charges provided in said tariff sheets, as tendered on August 6, 1957, have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful.

“The aforesaid First Revised Sheet No. 15 and Second Revised Sheet No. 14 to Pacific's FPC Gas

Tariff, Original Volume No. 1, provide for the sale of natural gas for resale to industrial customers.

*“The Commission finds:*

“It is necessary and proper in the public interest, and to aid in the enforcement of the provisions of the Natural Gas Act, that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, and services contained in Pacific’s FPC Gas Tariff, Original Volume No. 1, as proposed to be changed by the tariff sheets tendered on August 6, 1957; and that the aforesaid First Revised Sheet Nos. 4, 7, 10, 16-C, and 16-E; Second Revised Sheet Nos. 6, 8, 9, 11, 12, 13, and 20; and Original Sheet No. 20-A to Pacific’s FPC Gas Tariff, Original Volume No. 1, be suspended and the use thereof deferred as hereinafter ordered.

*“The Commission orders:*

“(A) Pursuant to the authority of the Natural Gas Act, particularly Sections 4 and 15 thereof, the Commission’s Rules of Practice and Procedure, and the Regulations under the Natural Gas Act. (18 CFR, Chapter I), a public hearing be held upon a date to be fixed by notice from the Secretary concerning the lawfulness of the rates, charges, classifications, and services contained in Pacific’s FPC Gas Tariff, Original Volume No. 1, as proposed to be changed by the aforesaid sheets tendered for filing on August 6, 1957.”

First Revised Sheet No. 15 referred to in the second paragraph above related to rates for industrial gas, but Petitioner’s contract does not include any service under that rate. Second Revised Sheet No. 14 is the sheet fixing rates for industrial interruptible gas under Petitioner’s contract. The Commission did not and could not have suspended these rates because of the *proviso* in Section 4(e). It is clear, however, that the statement

by the Commission that the increased rates and charges were not shown to be justified, and that they may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful, applied to Second Revised Sheet No. 14, as well as to the rates which were suspended. It is equally indisputable that the Commission's finding that it was necessary and proper in the public interest, and to aid in the enforcement of the provisions of the Natural Gas Act, that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications and services contained in Pipeline Corporation's Federal Power Commission gas tariff, Original Volume No. 1, as proposed to be changed by the tariff sheets tendered on August 6, 1957, included the rate change provided by Second Revised Sheet No. 14, under which purchaser purchases industrial gas, as well as to the rates for other classes of service. This finding by the Commission, coupled with the fact that at the end of the maximum suspension period the increased rates and charges for other than industrial gas were, by order issued April 28, 1958, permitted to become effective upon condition that Pipeline Corporation file bond to assure refund (R. 1219-27), establishes without question that the threat of taking of Petitioner's property without due process if the industrial rate is not rejected and Petitioner must pay it, effective September 5, 1957, is not illusory or inconsequential. The fact that by order issued September 25, 1959 (R. 1372-4) the Commission allowed Pipeline Corporation to substitute its undertaking for the surety bond in no way detracts from the finding that the rate increase provided by Second Revised Sheet No. 14 was not justified by the showing



made to support it when filed, and that it may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

The conclusion that there is a real and substantial threat of unconstitutional taking if the Commission's order permitting the filing under Section 4(d) is permitted to stand is supported by a more general view of the situation. In the brief filed by the Solicitor General for the Federal Power Commission on writs of certiorari in the Supreme Court of the United States in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 105, 3 L.Ed.(2d) 153, it was stated in Footnote 52a on page 80:

“During the calendar year 1956, the Commission ordered refunded to gas purchasers over \$63 million paid to pipelines which had been based on rates placed into effect subject to refund under Section 4(e), and ultimately found unlawful by the Commission.”

There is no reason to believe that in filing industrial rates which are not subject to suspension, refund or reparation, a natural-gas company will be more restrained than in filing increased rates for classes of service which are subject to suspension and to refund.

In its petition to the Commission for reconsideration (R. 1375-93) Petitioner stated that in the year 1957 it purchased from Pipeline Corporation under the contract of May 3, 1957 a total of 40,830,744 Therms of natural gas for distribution and resale to its customers, of which 40,304,671 Therms, or 98.7% of the total, was purchased

for resale for industrial use only. An increase of .36c per therm on this volume would have amounted to \$123,332.00 for this partial year, had the increased rate provided in the filing of August 6, 1957 been the rate provided in the May 3, 1957 contract.

If the order of the Commission under review stands, the increased rate will be effective from September 5, 1957 continuing to the present and for some unknown and unforeseeable period in the future. Although the Commission's order issued September 4, 1957 (R. 817-9) ordered a hearing concerning the lawfulness of this rate increase, no such hearing has been held, nor has a time for such a hearing been noticed. Two years have elapsed. This delay is understandable. In rate proceedings of the nature to be presented in the ordered hearing, it is to be expected that periods of four to five years may elapse before final determination. It is not to be expected that a natural-gas company will cooperate to expedite such a matter when it concerns industrial rates which during the whole interim period of years must be paid without any obligation or liability on the part of the natural-gas company to make refund if ultimately found unlawful.

Not only will such interim payments be made without any right to refund or to reparations, but Petitioner has also been deprived by the Natural Gas Act of any right to recover such unlawful payments by court action. *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.*, 341 U.S. 246, 95 L.Ed. 912; *T.I.M.E., Inc. v. United States of America*, 3 L.Ed.(2d) 952, de-

cided by the Supreme Court of the United States May 18, 1959. No substitute remedy of any kind has been provided by the Act. Petitioner is left to the arbitrary will of Pipeline Corporation. Such a statutory scheme is a flagrant denial of due process. Constitutional Law, 12 Am. Jur. 279, §582; Constitutional Law, 16A C.J.S. 767, §614; *Chicago, Milwaukee & St. Paul Ry. Co. v. State of Minnesota*, 134 U.S. 418, 33 L.Ed. 970; *Truax v. Corrigan*, 257 U.S. 312, 66 L.Ed. 254; *Gilman v. Tucker*, 128 N.Y. 190, 28 N.E. 1040, 13 L.R.A. 304; *Detroit Trust Co. v. Stormfeltz-Loveley Co.* (Mich.), 242 N.W. 227.

Petitioner is a public utilities company. We perceive no reason why it is not as fully entitled to the protection of the Fifth Amendment as is Pipeline Corporation. Under fundamental principles that protection cannot be denied Petitioner. The rule with respect to due process as applied to public utilities is succinctly stated in 12 Am. Jur. 373, §698, as follows:

§698. Public Utilities. . . . In accordance with the general principles of reasonableness and fair play required of all governmental activity or regulation by the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and similar clauses in the various state Constitutions, although it is settled that the states may regulate the business of public utilities, including not only regulation of public service property, but the compensation to be paid for its use, because such businesses are of a nature in which the public have an interest or use, or, to use a phrase which has become historical in connection with the regulation of utilities and allied enterprises, namely, because they are businesses affected with a public

interest, it is equally well settled that the property of public utilities is private property of which a person cannot be deprived without due process, which entails reasonable compensation in every case for its taking. . . .

“A public utility must be afforded some opportunity to be heard as to the reasonableness of the rates fixed for its charges by a rate-fixing commission. The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the commission must act upon evidence and not arbitrarily. Such procedure is an inexorable safeguard. Moreover, there can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay when such minimum requirements are ignored. . . .”

These principles are common ground and there is no purpose in referring to the many decisions of the Supreme Court of the United States which are cited to support the foregoing text. It cannot be denied that Petitioner is entitled to these rights, and that the Natural Gas Act deprives it of them. Respondent may say that this incongruity is justified because if Pipeline Corporation's rates are too low it has no means of recouping the loss of its property, while Petitioner can do so by imposing the unlawful rates upon its customers. Such an argument is contrary to fundamental right and justice. Moreover, it is illusory. Petitioner is a regulated utility and can increase its rates only subject to control of the state regulatory body of the State of Washington. More importantly, it overlooks the fact that Petitioner's



customers may not choose to pay rates predicated upon unreasonable and unlawful charges being passed on to them. The complete answer to such a view is found in the opinion of the Court of Appeals of the Third Circuit in the case of *Natural Gas Pipeline Co. v. Federal Power Commission*, 253 F.(2d) 3, at page 9, where it said:

“Finally, respondent and intervenor by motion to dismiss and on the merits maintain that petitioner is not aggrieved by any of the Commission orders involved.

“We have dealt with the order of February 24, 1956 immediately above. Other than it, the argument seems to be that because the advance in the price to Natural has been reflected in the price to its customers, Natural has not been aggrieved.

“This proposition is at the least, unrealistic. Natural is entitled to deal with its customers ethically and, engaged in a fiercely competitive business as it is, must do so in order to survive. It could not stand by and suffer an unlawful fifty-seven per cent increase to be loaded on its purchasers. There is no indication that the latter are captive buyers or that they would submit to that sort of treatment. So it has been not only high level business but sound business for Natural to contest the issue. All in all Natural is truly an aggrieved person within §19(b) of the Act.”

Respondent may urge that the decision of the Supreme Court of the United States in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 105, 3 L.Ed.(2d) 153, should govern. Without reference to more particular differentiations, we believe the short and conclusive answer is that, first, the contract under consideration there contained no provision

giving the purchaser distributor the right to protest increases before the Federal Power Commission, and second, the constitutional question raised in this proceeding before the Federal Power Commission and before this court was not raised in that proceeding, either before the Federal Power Commission or the court.

## CONCLUSION

In conclusion, we submit that the Federal Power Commission erred in denying Petitioner's motion to strike the filing under Section 4(d) of the increased rate for industrial gas because Pipeline Corporation bargained away the right to make such a unilateral filing by its contract, and, if this contention be not sustained, then because to permit such a unilateral filing would deprive Petitioner of its property without due process, contrary to the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

PRESTON, THORGRIMSON & HOROWITZ

Office and Post Office Address:  
Northern Life Tower  
Seattle, Washington

METZGER, BLAIR & GARDNER

A. E. BLAIR

Office and Post Office Address:  
521 Tacoma Building  
Tacoma 2, Washington  
*Attorneys for Petitioner.*

## APPENDIX A

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time, (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas com-

pany in any such rate, charge, classification, or service, or in any rule, regulations or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published .

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made



at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. \* \* \*

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

SEC. 19 (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. \* \* \*